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# AGENDA SETTING IN THE COURTS OF APPEALS: THE EFFECT OF IDEOLOGY ON EN BANC REHEARINGS

Phil Zarone\*

## INTRODUCTION

Scholars have long recognized the critical importance of “agenda setting” in politics.<sup>1</sup> Simply put, agenda setting refers to the process by which an issue enters the public consciousness and is acted upon by policymakers.<sup>2</sup> Issues that do not reach the agenda do not get decided, and the status quo prevails. Tracking which issues are addressed and which issues are ignored can provide a unique insight into political behavior.

The concept of agenda setting can also be useful in understanding the behavior of judges on the United States courts of appeals. Normally, of course, judges on the courts of appeals have no control over their agenda and are compelled to decide all cases brought before them. There is, however, an important exception. When judges vote to rehear a case en banc, they have the discretion to determine which issues will receive the attention of the full court and be favored with all the authority that an en banc opinion commands. The en banc process gives judges on a court of appeals the unique opportunity to shape their own agenda, and thus the law of the circuit, by reaching out and deciding cases that are important to them.

Numerous aspects of judicial agenda setting are worthy of study. For example, the manner in which en banc decisions are

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1. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984).

2. B. GUY PETERS, *AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE* (2d ed. 1986).

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subsequently treated by other courts and the subject matter of en banc decisions both say something important about the behavior of a court of appeals. This study proposes a methodology for examining one crucial aspect of judicial agenda setting: the role of ideology in the selection of cases for en banc review and their subsequent resolution by the full court.

At the outset, it is worth noting that measures of ideology, which are difficult under any circumstance, are especially problematic in the judicial context because of the doctrine of *stare decisis*. It is no doubt true that judges generally do follow precedent. This article does not mean to suggest otherwise. The problem in analyzing judicial decisions, then, is to separate the effects of ideology from the effects of *stare decisis*.

The measures proposed in this article are premised on the notion that ideological voting is more likely to be found in cases in which there is a dissenting opinion.<sup>3</sup> The presence of a dissent suggests that the law governing a case may have been unclear, or that settled law could have been applied differently to a specific set of facts. In such instances, judges may be more likely to resort to other factors, such as their ideological predispositions, to guide their decisionmaking. Thus, the measures developed here rely on the existence of a dissenting opinion to signal the presence of ideological voting.

Section 1 of this article evaluates the amount of discretion that judges have in shaping the court's agenda through use of the en banc process. It reviews the legal authority for en banc rehearings, and concludes that rehearings are appropriate only to resolve intra-circuit conflict or to address questions of "exceptional importance."<sup>4</sup> However, this legal authority does not dictate that en banc majorities treat all questions of exceptional importance equally. Thus, there is nothing to preclude an en banc majority from systematically rehearing certain types of exceptionally important cases while refusing to rehear other exceptionally important cases.

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3. Professor Arthur Hellman from the University of Pittsburgh School of Law suggested this measure to me. Any errors in developing and applying it are, of course, mine.

4. FED. R. APP. P. 35.

The article next addresses the manner in which courts of appeals have actually used en banc rehearings. Section II discusses the method by which panel decisions were identified for inclusion in this study and classified as either liberal or conservative. Section III applies this method to evaluate the use of en banc rehearings in the Fourth and Fifth Circuit Courts of Appeals in 1995 and 1996.

The data in Section III show that en banc courts reviewed liberal panel decisions much more frequently than they reviewed conservative panel decisions, and that each liberal panel decision that was reviewed was also reversed.<sup>5</sup> These findings suggest that ideology played a significant role in the decision to rehear these cases en banc. However, a review of the cases that were reversed en banc also suggests that the great majority of them satisfied the test for “exceptional importance,” and thus qualified for en banc review. Therefore, even if en banc majorities used rehearings in an ideological manner, it is difficult to argue that doing so was inconsistent with the underlying legal authority.

Section IV then considers the *effect* of the ideological use of en banc rehearings. A sample of panel decisions in the areas of civil rights, employment discrimination, and criminal law is evaluated to determine how often liberals in the Fourth Circuit won at the panel level, and whether en banc rehearings were used to reverse a significant number of these liberal victories. The data show that 14 of the 25 liberal panel victories in the sample qualified as “true” liberal victories. Of these 14 cases, 6 were reversed by the en banc court, suggesting that the en banc process can be an effective mechanism for enforcing the majority’s views.

## I. STANDARDS FOR GRANTING EN BANC REVIEW

One of the most important arguments advanced by proponents of en banc rehearings is that they allow a majority of

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5. Technically, an en banc court does not “reverse” a panel decision. Rather, the panel decision is vacated by a vote to rehear the case en banc, and the en banc court either affirms or reverses the lower court decision. However, for ease of reference, this article will discuss “reversals” of panel decisions.

judges in the circuit to determine the circuit's law. Advocates of en banc review argue that two judges on a panel should not have the power to bind the circuit to precedent with which a majority of the circuit disagrees.<sup>6</sup> This argument has intuitive appeal, given the tradition of representative institutions in the United States. However, critics argue that appellate courts are *not* representative bodies akin to legislatures, so the degree to which a panel reflects the will of the majority is irrelevant.<sup>7</sup>

The debate over majority rule reflects a difference of opinion over the relationship between a panel and the full court. The notion that majority rule is proper assumes that panels are merely agents of the full court, bound to follow the preferences of the circuit majority. In contrast, deference to panel decisions requires that one see panels and the circuit court as the same.

Congressional and Supreme Court guidance support the view that a circuit court is comprised of all its members, and that panels are merely agents of the full court. At first glance, this conclusion may seem to suggest that an ideological majority should be free to use the en banc process to reverse panel decisions with which it disagrees. However, Congress and the Supreme Court have also indicated that the use of panels constitutes a delegation of power by the full court to the panel,

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6. See, e.g., Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1034 (1991); Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 823 (1993); Stephen Wermiel, *Reagan and the Courts: Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, WALL ST. J., Mar. 22, 1988 (quoting one judge as stating that en banc rehearings are "a stabilizing process that makes sure the majority's voice is heard"). As used in this paper, a majority "disagrees" with a panel result when there are two equally tenable positions on an issue and the panel and majority prefer different sides. This differs from a majority asserting that a panel has "erred," which is interpreted here to mean that the panel has taken a "clearly erroneous" position.

7. As Judge Edwards noted in *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (en banc) (per curiam) (Edwards, J., concurring):

Underlying the dissenters' calls for rehearings *en banc* . . . is the implicit view that every time a majority of the judges disagree with a panel decision, they should get rid of it by rehearing the case *en banc*. The error in this proposition is the concept that it is somehow desirable that majority rule should determine the outcome of cases. However salutary that principle may be in the context of popularly elected legislatures where a majority decision reflects the will of the voters who chose the lawmakers, it has no equivalent value in an intermediate court of review.

and that such delegation should only be withdrawn under certain circumstances. It is these circumstances that are at issue in this article.

This section concludes that a majority's dissatisfaction with a panel result, absent intra-circuit conflict or a question of "exceptional importance," does not qualify as a reason to remove the power to decide a case from the panel.<sup>8</sup> At the same time, not all questions of exceptional importance must be treated equally, and an en banc majority is free to rehear certain types of "exceptionally important" cases while ignoring others.

### A. *History of En Banc Rehearings*

The en banc rehearing originated in the Third Circuit in 1940.<sup>9</sup> At that time, conflicting statutory language created uncertainty as to the size of circuit courts. On one hand, the Judicial Code of 1911 stated that "a circuit court of appeals . . . shall consist of three judges."<sup>10</sup> On the other hand, the statute authorized four judges in the Second, Seventh, and Eighth Circuits, and later amendments added fourth and fifth judges to other circuits.<sup>11</sup> In 1938, the Ninth Circuit looked to the language of the original 1911 statute in concluding that "[s]ince no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number."<sup>12</sup> However, two years later the Third Circuit reached the opposite conclusion, and found that a circuit court consisted of all the judges appointed to the circuit.<sup>13</sup> In 1941, in *Textile Mills Securities Corp. v. Commissioner*,<sup>14</sup> the Supreme Court endorsed

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8. FED. R. APP. P. 35.

9. See *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940), *aff'd*, 314 U.S. 326 (1941).

10. See Ginsburg & Falk, *supra* note 6, at 1009 (quoting Act of Mar. 3, 1911, ch. 231, § 117, 36 Stat. 1131).

11. See *id.* (quoting Act of Mar. 3, 1911, ch. 231, § 118, 36 Stat. 1131 (authorizing four judges in the Second, Seventh, and Eighth Circuits); Act of June 10, 1930, ch. 437, 46 Stat. 538 (adding fourth judge to the Fifth Circuit); Act of June 10, 1930, ch. 438, 46 Stat. 538 (adding fourth judge to Third Circuit); Act of June 29, 1936, ch. 753, 49 Stat. 1903 (adding fifth judge to Third Circuit)).

12. See *Lang's Estate v. Commissioner*, 97 F.2d 867, 869 (9th Cir. 1938).

13. See *Textile Mills*, 117 F.2d at 70-71.

14. 314 U.S. 326 (1941).

this result, and en banc procedures were codified by Congress in 1948.<sup>15</sup> Federal Rule of Appellate Procedure 35, which was promulgated in 1968, provides additional authority and guidance for en banc rehearings.<sup>16</sup>

### *B. Legal Authority for En Banc Rehearings*

The debate over the propriety of en banc rehearings is usually waged in the utilitarian language of cost-benefit analysis.<sup>17</sup> Commentators have focused on issues such as uniformity and finality of law, cost and delay, and collegiality, and have tried to conduct a balancing analysis to determine whether rehearings are desirable or not.<sup>18</sup> While these analyses are useful, they ignore what should be the primary question in evaluating the use of rehearings: When are they appropriate according to the underlying legal authority?

The question of legal authority begins with the relationship between the panel and the full court. Evidence that the power of a circuit court is vested in all its judges, not its panels, is implicit in *Textile Mills*' holding that a circuit court could rehear a case en banc. The Court in that case expressly stated the following:

We cannot conclude, however, that the word "court" as used in those other provisions of the Judicial Code means only three judges. That would not only produce a most awkward situation; it would on *all* matters disenfranchise

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15. See Judicial Code and Judiciary Act, Pub. L. No. 80-773, 62 Stat. 869, 871-72 (1948) (codified as amended at 28 U.S.C. § 46(c) (1994)).

16. These authorities mandate that the decision to rehear a case en banc is to be made by a majority vote "of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46(c) (1994). However, the circuits disagree on whether recused judges meet this criterion. See, e.g., Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sitings in the United States Courts of Appeals*, 70 VA. L. REV. 1505 (1984). The same ambiguity applies to the composition of en banc courts, since they also are to include "all circuit judges in regular active service." 28 U.S.C. § 46(c). En banc courts may include senior circuit judges who were members of the panel whose decision is under review. However, participation of the senior judge is at his or her own discretion. See *id.* Suggestions for rehearing en banc may be made sua sponte or by petition of the litigants. FED. R. APP. P. 35; see also *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953).

17. See Stein, *supra* note 6, at 819-20.

18. See Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 41 (1988).

some circuit judges against the clear intendment of § 118. Nor can we conclude that the word “court” means only three judges when the court is sitting, but all the judges when other functions are performed. Certainly there is no specific authority for that construction. And it is difficult to reach that conclusion by inference. For to do so would be to imply that Congress prohibited some circuit judges from participation in the most important function of the “court” (the hearing and the decision of appeals),<sup>19</sup> though allowing all of them to perform the other functions.

Similarly, the Court in *United States v. American-Foreign Steamship Corp.* noted that en banc courts “are convened only when extraordinary circumstances exist that call for authoritative consideration and decision *by those charged with the administration and development of the law of the circuit.*”<sup>20</sup> Thus, power in a circuit court is held by its full complement of active judges.

Although it is clear that power in a circuit court resides in all its judges, it is also clear that Congress intended to preserve the tradition of three-judge panels when it codified *Textile Mills* in 1948. Congress passed legislation providing that “[i]n each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges.”<sup>21</sup> Congress also provided that the full court could withdraw this delegation of power to panels by voting to rehear a case en banc.<sup>22</sup> However, Congress did not say *when* the grant of power to the panel could be withdrawn. Thus, for many years circuit courts could rely only on limited Supreme Court precedent to determine when rehearings en banc were proper.

When the Supreme Court first approved the use of rehearings in 1941, it stated only that “[use of the en banc rehearing] makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in

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19. *Textile Mills Sec. Corp v. Commissioner*, 314 U.S. 326, 333 (1941).

20. 363 U.S. 685, 689 (1960) (emphasis added).

21. 28 U.S.C. § 46(b) (1994). The statute makes an exception for the Court of Appeals for the Federal Circuit, which may sit in panels of more than three judges. 28 U.S.C. § 46(c).

22. 28 U.S.C. § 46(c).



the circuit courts of appeal will be promoted.”<sup>23</sup> Thus, the initial Court justification for en banc rehearings did not rely on the theory that the panel should represent the will of the majority.

The Court addressed en banc rehearings again in 1953.<sup>24</sup> In a separate opinion, Justice Frankfurter noted that:

Rehearings en banc by these courts, . . . are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, *determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it.* Hearings en banc may be a resort also in cases extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit.<sup>25</sup>

Standing alone, the italicized language would seem to be a clear endorsement of the majoritarian use of en banc review. Placed in context, however, Justice Frankfurter is limiting the majoritarian use of en banc rehearings to situations where it will serve the ultimate end of avoiding intra-circuit conflict.<sup>26</sup> Thus, a panel decision that resolves a legal question in a manner that is unsatisfactory to the majority, and that will inevitably be a source of intra-circuit conflict in the future, may rightly be reversed. On the other hand, a panel decision that applies settled

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23. See *Textile Mills*, 314 U.S. at 334-35. It is interesting that the Court believed that the en banc procedure would promote finality of decision. I agree with other commentators who argue that frequent use of en banc rehearings *detracts* from finality because litigants can never be sure if a victory at the panel stage is really the end of the lawsuit. See, e.g., Ginsburg & Falk, *supra* note 6, at 1021.

24. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953).

25. See *id.* at 270-71 (emphasis added). The majority opinion uses language that is consistent with Justice Frankfurter, albeit less well reasoned. The majority notes only that en banc rehearings are “an important and useful device in the administration of justice,” and that the Court had approved of en banc review in a case where a “conflict of views” had arisen among a circuit court’s judges. *Id.* at 260 n.20.

26. One commentator has observed that “[u]niformity has been described as ‘the most basic principle of jurisprudence.’ This is because ‘[it] promotes the twin goals of equity and judicial integrity.’” Stein, *supra* note 6, at 821 nn. 79-80 (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982); Ruth B. Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1424-25 (1987)).

law to a certain set of facts should not be disturbed by a circuit majority, because such decisions will have little or no effect on future cases.

The Supreme Court's 1960 decision in *American-Foreign Steamship Corp.*<sup>27</sup> supports this interpretation of the rationale behind the en banc process. In *American-Foreign Steamship Corp.*, the Court noted that "[t]he principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control *and thereby to secure uniformity and continuity in its decisions.*"<sup>28</sup> Thus, as in *Western Pacific*, majority control is less important as an end in itself than as a way to achieve "uniformity and continuity."

The promulgation of rule 35 in 1968 essentially codified the rationales for en banc rehearings offered by the Supreme Court. Significantly, rule 35 does not include a majoritarian justification for rehearings. Instead, it states that "rehearing[s] [are] not favored and ordinarily will not be ordered" unless one of two exceptions applies.<sup>29</sup> Because neither of these exceptions endorses rehearings when a majority on the circuit simply disagrees with the panel, a purely majoritarian use of the en banc procedure is improper.

The first exception outlined in rule 35 states that rehearings may be ordered "to secure or maintain uniformity of the court's decisions."<sup>30</sup> This exception is a codification of the Supreme Court precedent discussed above, and clearly does not authorize a majoritarian use of en banc rehearings.

Rule 35's second exception is that rehearings may be ordered to resolve questions of "exceptional importance."<sup>31</sup> A loose interpretation of this phrase could be used as evidence that rehearings may serve as a majoritarian device, because a question of "exceptional importance" could be defined as anything that the majority believes is worth rehearing. However,

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27. 363 U.S. 685 (1960).

28. *Id.* at 689-90 (emphasis added).

29. FED. R. APP. P. 35.

30. *Id.*

31. *Id.*

such an expansive interpretation of the term “exceptional importance” is inconsistent with the cautionary language used by the Supreme Court and the Federal Rules in discussing the propriety of en banc review. As noted previously, rule 35 states that rehearings are “not favored and ordinarily will not be ordered.”<sup>32</sup> Similarly, Justice Frankfurter has observed that “[r]ehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure.”<sup>33</sup> This guidance suggests that a more rigorous test of “exceptional importance” is required.

Another possible interpretation of an exceptionally important case is one in which the panel result is “clearly erroneous.”<sup>34</sup> Judges are accustomed to determining when something is clearly erroneous, and there exists defining caselaw as a guide. However, such a standard reduces the en banc court to another layer of appellate review rather than a body that establishes the direction of the legal doctrine of the circuit.<sup>35</sup> Accordingly, clearly erroneous panel rulings do not satisfy the test for exceptional importance, and thus do not warrant en banc review.<sup>36</sup>

Perhaps the most useful test for an exceptionally important case is whether or not it involves the creation of law rather than the application of settled law to the facts of a case. The Court in *American-Foreign Steamship Corp.* lent some credence to this test when it noted that the en banc court should be employed

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32. *Id.*

33. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 270 (1953).

34. For a list of citations supporting the proposition that panel error should be addressed by en banc treatment, see Solimine, *supra* note 18, at 48.

35. See, e.g., *Western Pacific*, 345 U.S. at 273-74 (Jackson, J., dissenting) (“Rehearings *en banc* are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to this Court. Delay, cost, and uncertainty, which take their toll of both the successful and the unsuccessful, the just and the unjust litigant, are each increased by an additional appeal to a hybrid intermediate court. Moreover, the fact that the court leaves the precise nature of the right which it confers on the losing litigant so unsettled and equivocal would lead me to conclude that the *en banc* question is one which the litigant should not be given standing to raise.”); *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (per curiam) (“The function of en banc rehearings is not to review alleged errors for the benefit of losing litigants.”).

36. For a list of citations supporting the proposition that erroneous rulings do not justify en banc treatment, see Solimine, *supra* note 18, at 48.

when a question involves the “development of the law of the circuit.”<sup>37</sup> The Court also quoted approvingly from the lower court decision, which viewed the purpose of the en banc to be “that active circuit judges shall determine the major doctrinal trends of the future for their court.”<sup>38</sup>

Evaluating whether a case merits en banc review by determining whether new law is being created has several advantages. Most importantly, by definition, the creation of law affects more than merely the interests involved in a case.<sup>39</sup> Also, it avoids subjective and time-bound determinations of importance. Although the development of a relatively esoteric area of law may seem unimportant today, that precedent will still exist decades into the future if the once-esoteric area of law is suddenly thrust into the limelight.

Law creation does suffer from an important drawback. As Professor Solimine has pointed out, no two cases are identical, and anytime settled law is applied to a new set of facts the court could be said to be engaging in “law creation.”<sup>40</sup> Nonetheless, it should be possible to distinguish cases where law creation involves a circuit court’s “major doctrinal trends”<sup>41</sup> from cases where law creation results from application of settled law to a new set of facts, with the former being the most likely candidates for en banc review under the rubric of “exceptional importance.”

This review of the legal authority for en banc rehearings indicates that rehearings are only proper to resolve intra-circuit conflicts or issues of exceptional importance. A panel decision that applies settled law to the facts of a case clearly does not qualify for en banc review under either of these tests. Thus, en banc reversals of panel decisions based solely on ideological factors is improper. However, nothing in the underlying legal authority requires en banc majorities to rehear each case that qualifies for en banc review. Consequently, en banc majorities are not prevented from relying on ideological factors in

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37. 363 U.S. 685, 689 (1960).

38. *Id.*

39. See Solimine, *supra* note 18, at 53.

40. See *id.*

41. *American Foreign S.S. Corp.*, 363 U.S. at 689.

determining which exceptionally important cases to rehear and which to let stand.

## II. IDENTIFYING IDEOLOGICAL VOTING

Measuring ideology is difficult under the best of circumstances. The concept comprises many dimensions, and individuals who are conservative on one issue may be liberal on another, either because they think through issues differently or because their personal experiences compel inconsistency. Nonetheless, “liberals” and “conservatives” do generally tend to approach issues in a consistent manner,<sup>42</sup> and the concepts can be useful if they are recognized as generalities.

Measuring ideology in the judicial context is particularly difficult due to the doctrine of *stare decisis*. It is no doubt true that judges generally do follow precedent.<sup>43</sup> Thus, for any given decision, it is necessary to isolate the effect of ideology and the effect of *stare decisis*.

The assumption underlying the measure of ideology used in this article is that the ideological tendencies of judges are more likely to surface in cases with dissents. If the rule of law is obvious, judges will most likely vote unanimously to follow precedent. However, if precedent is vague or not on point, judges are more likely to rely on other factors, including their ideological beliefs, in deciding cases. Similarly, when the law is clear but facts weigh on both sides of an issue, judges may consciously or unconsciously resort to ideology to assist in their decisionmaking.<sup>44</sup> Moreover, both the majority and minority

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42. See, e.g., Lawrence Baum, *Judicial Politics: Still a Distinctive Field*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 189, 190 (Ada W. Finifter ed., 1983).

43. See *infra* Table 1 and accompanying text; see also Stein, *supra* note 4, at 847 (quoting a member of the bench who observed that “members of the federal judiciary strive, most often successfully, to decide cases in accord with the law rather than with their own ideological or partisan preferences”).

44. For example, judges in the Ninth Circuit have acknowledged that judicial philosophy plays a role in their evaluation of fact-specific determinations of the pain suffered by disability claimants or the fear of persecution experienced by those fighting deportation. Judges who believe that “it is not the judicial role to reverse every miscarriage of justice” are probably more likely to accept agency findings adverse to the plaintiff. Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 973-74 (1991).

opinions in cases with dissents are likely to be more comprehensive and forceful, if only because the writers feel compelled to address the arguments of the other side.

Table 1 supports the proposition that cases with dissents are more likely to involve ideological voting. To preview the findings of Section IV, Judges Hall, Michael, Murnaghan, and Butzner of the Fourth Circuit generally voted to favor liberal interests in the sample of panel decisions studied in this article.<sup>45</sup> However, every time combinations of these four judges came together over a two-year period, they voted unanimously to affirm conservative district court rulings, mostly on questions of criminal law. This unanimity suggests that, regardless of judges' ideology, they will conform to precedent when precedent is clear. Controversial cases (i.e., those with dissents) are thus the best avenue of expression for judicial ideology.

TABLE 1

VOTING BEHAVIOR OF PANELS COMPRISED OF LIBERAL JUDGES  
FOURTH CIRCUIT, 1995-96

Panel Members	Number of Cases	District Court	Panel Decision	Number of Full Opinions	Number of Per Curiam Opinions
Hall Michael Murnaghan	7	All conservative	Affirm all	0	7
Hall Michael Butzner	7	All conservative	Affirm all	0	7
Michael Murnaghan Butzner	3	All conservative	Affirm all, one modification	0	3

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45. See *infra* Table 5.

To identify panel decisions with a dissent, a Westlaw search<sup>46</sup> of cases in the Fourth and Fifth Circuit Courts of Appeals was conducted for the years 1995 and 1996.<sup>47</sup> Both published and unpublished opinions were considered.<sup>48</sup> Cases were then classified as conservative, liberal, or non-ideological, and the votes of each judge for conservative or liberal positions were tallied. Cases were classified as liberal or conservative based largely on the economic and social position of the litigants.<sup>49</sup> Generally, a vote for “the underdog,” or the litigant with fewer economic or social resources, was considered liberal, while a vote for the party with more resources was considered conservative.<sup>50</sup> When the government was a litigant, the purpose of government intervention was weighed. For example, though the National Labor Relations Board (NLRB) arguably has more influence than a small business, it stands in the shoes of

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46. The databases were CTA4 and CTA5, and the search was: (judge /s dissent!) & da(199\_).

47. The years 1995 and 1996 were chosen because the research for this article was conducted in 1997, while the author was a law student at the University of Pittsburgh. Efforts to update this research to include later years are discussed below. See *infra* note 54.

48. The Fifth Circuit included very few unpublished opinions on Westlaw in 1995 and 1996. This practice is reflected in the different number of cases available for analysis in the Fourth and Fifth Circuits (see Tables 3 and 4). One might expect unpublished opinions to receive different treatment than published opinions. After all, unpublished opinions are not precedential (though they do have persuasive value), and the panel must not have thought the decision significant enough to have it published. However, as the data will show, unpublished opinions in the Fourth Circuit constituted 40 percent of the cases granted en banc review in 1995 (4 of 10). Since the Fourth Circuit does not appear to view unpublished opinions as unimportant, they will be considered with published opinions.

49. See, e.g., Daniel J. Foley, *Tennessee Supreme Court: A Statistical Analysis of an Ideological Shift After the 1990 Election*, 64 TENN. L. REV. 155, 159 (1996).

50. Using the nature of the party as a criterion for classification suggests that the *result* of judicial decisionmaking was more important than the *reasoning* behind that decisionmaking. For the most part, this is true. The influence of ideology is likely to be unconscious, so explanations for behavior would not reflect its actual effect. At the same time, judges' explanations for their votes were not completely ignored. For example, in *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), the panel majority affirmed the defendant's conviction for possessing a machine gun. *Id.* at 792. Normally, a case affirming a conviction would be classified as conservative. However, in *Kirk*, the panel majority also upheld the constitutionality of the statute the defendant was found to have violated. *Id.* at 797. The dissent argued that the Commerce Clause does not allow Congress to reach this type of behavior, and emphasized its reluctance to allow “federal police power into every village” in the United States. *Id.* at 802. Since it was clear that the dispute in *Kirk* was over the scope of Congressional power, not the fate of the individual defendant, the decision was classified as liberal.

individual workers. Thus, a vote for the NLRB was deemed liberal.

Another factor influencing case assignment was whether the plaintiff's claim implied a larger or smaller role for government and the courts in society. For example, the economic and social resources of adversaries in a tort proceeding may be identical. However, because a decision for the plaintiff generally expands the role of the state in individuals' lives, such votes were classified as liberal.

The effect of a case on federal-state relations also affected its classification. Votes that favored an assertion of federal over state power were generally seen as liberal, while votes in favor of the states were viewed as conservative.

Finally, some cases were classified according to positions staked out by adversaries in the "culture wars."<sup>51</sup> For example, votes for gay rights, affirmative action, or separation of church and state (especially where fundamentalist Christians are involved) were viewed as liberal.<sup>52</sup> Table 1 includes an issue-by-issue description of the coding scheme.

Some cases could not be classified as liberal or conservative, and were therefore not included in the analysis. For example, cases pitting one corporation against another in a contract dispute or bankruptcy proceeding are generally non-ideological. Similarly, cases in which entities such as hospitals or business corporations seek clarification of dense statutory language raise no ideological issues.

Ideological classification depended on the nature of the controversy between the majority and dissent, not on the overall

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51. For information on the "culture wars," see, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987); *CULTURE WARS: OPPOSING VIEWPOINTS* (Fred Whitehead ed. 1994); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

52. See, e.g., *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996), where the court held that a heterosexual male employee could sue his homosexual male supervisor under Title VII for sexual harassment. Normally, a victory for the plaintiff in a Title VII case would be considered liberal. However, because the holding of this case adversely affects homosexuals, it was considered conservative. Similarly, in *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), the panel held that an evangelical Christian did not state a claim for relief under Title VII. This holding was classified as liberal because the religious component of the case seemed more important than the Title VII component.



tenor of their opinions. If the majority reached a mix of conservative and liberal conclusions, the classification of the majority and dissenting opinions depended on the aspect of the holding with which the dissent disagreed. For example, if the majority found that a search was legal (conservative) but that excessive force was used (liberal), and the dissent disagreed that the force was excessive (conservative), the majority opinion would be classified as liberal and the dissent conservative. Similarly, if one portion of a dissent was liberal, in opposition to a conservative majority finding, and another portion of the dissent was conservative, in opposition to a liberal majority finding, the case was entered into the database twice.<sup>53</sup>

TABLE 2

Type of Case	Liberal	Conservative
14th Amendment	Vote in favor of due process or equal protection	Vote to deny due process or equal protection
1st Amendment	Vote for less control of expression	Vote to allow some restriction of expression
Civil Rights	Vote for plaintiff	Vote for defendant (frequently police)
Criminal	Vote for the accused	Vote for law enforcement
Employment benefits (e.g. Black Lung Act)	Vote to grant benefits	Vote to deny benefits
Employment discrimination (ADA, ADEA, Title VII)	Vote for employee	Vote for employer

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53. For example, in *Beaver v. Netherland*, 101 F.3d 977 (4th Cir. 1996), Judges Luttig and Widener denied the defendant's motion for a stay of execution, with Judge Hall dissenting. *Id.* at 980. Thus, the decision was classified as conservative. However, Judges Hall and Widener agreed to grant the defendant's motion for more time to file a petition for certiorari, with Judge Luttig dissenting. *Id.* Thus, the decision was also classified as liberal.

Federalism (dispute between different levels of government)	Vote for power of federal government	Vote for power of state or local government
Habeas Corpus	Vote to grant petition	Vote to deny petition
Insurance Disputes	Vote for the insured (only if an individual)	Vote for insurance company
Labor	Vote for worker or NLRB	Vote for the employer
Negligence	Vote to allow plaintiff's claim to proceed	Vote to deny or limit plaintiff's claim
Products liability	Vote for plaintiff	Vote for manufacturer
Voting rights	Vote which favors traditionally disenfranchised groups, assuming conflict is with group traditionally in power	Vote against traditionally disenfranchised groups
Gay rights	Vote for gay rights	Vote against gay rights
Religious expression	Vote opposing religious expression	Vote favoring religious expression
Affirmative action	Vote for affirmative action	Vote against affirmative action

### III. EN BANC TREATMENT OF LIBERAL AND CONSERVATIVE PANEL DECISIONS

Once panel decisions with a dissent were identified and classified as either liberal or conservative, their history was traced to determine whether they were reversed by an en banc rehearing. The data reveal that liberal panel victories were reheard much more often than conservative panel victories, and that every liberal decision that was reheard was also reversed.

This section presents these findings in more detail, then evaluates whether this ideological use of rehearings was consistent with the underlying legal authority.

Table 3 shows that 14 of 47 (30%) of liberal panel decisions with a dissent were reheard en banc in the Fourth Circuit. Conversely, only 4 of 63 (6%) of conservative panel decisions with a dissent were reheard. Results upon rehearing are just as skewed. In the Fourth Circuit, *each* of the liberal panel decisions reviewed by the full court was reversed, while only 1 of 3 conservative victories were reversed.

TABLE 3

EN BANC REVERSALS OF PANEL DECISIONS  
FOURTH CIRCUIT, 1995-1996

	Panels with Dissents	Rehearing En Banc	Number Conserva- tive on rehearing	Number Liberal on rehearing	Percent Panel Reversed
Liberal	47	14	14	0	30%
Conservative	63	4	3	1	2%
Non- ideological	35	0	N/A	N/A	0%
<b>Total</b>	<b>145</b>	<b>18</b>	<b>17</b>	<b>1</b>	<b>N/A</b>

Results in the Fifth Circuit are similar. Table 4 shows that 8 of 21 (38%) of liberal panel decisions with a dissent were reheard, while *no* conservative panel decisions with a dissent were reheard. Upon rehearing, each of the 8 liberal panel decisions was reversed.

The “non-ideological” rows of Tables 3 and 4 can also be used to assess the influence of ideology on en banc decisionmaking. Although the use of panel decisions with a dissent was meant to identify ideological voting, some cases with dissents simply did not involve an ideological issue. Of

these cases, none was even *reviewed* by an en banc court in either circuit.

TABLE 4

EN BANC REVERSALS OF PANEL DECISIONS  
FIFTH CIRCUIT, 1995-1996

	Panels with Dissents	Rehearing En Banc	Number Conserva- tive on rehearing	Number Liberal on rehearing	Percent Panel Reversed
Liberal	21	8	8	0	38%
Conservative	26	0	0	0	0%
Non- ideological	23	0	N/A	N/A	0%
<b>Total</b>	<b>70</b>	<b>8</b>	<b>8</b>	<b>0</b>	<b>N/A</b>

Tables 3 and 4 present clear evidence that ideology affected the agenda of the Fourth and Fifth Circuit Courts of Appeals. En banc courts reviewed 22 liberal panel decision and only 4 conservative decisions in 1995 and 1996.<sup>54</sup> Moreover, all 22 liberal panel decisions were reversed, while only one conservative decision was reversed. Because there is no reason to believe that questions worthy of en banc review appear only in liberal panel decisions, it is reasonable to conclude that ideology played a role in the selection of cases for rehearing.

The fact that ideology affects the selection of cases for en banc review does not necessarily mean that the en banc process is being used improperly. If a panel has decided a question of exceptional importance or an intra-circuit conflict in a manner favored by the en banc majority, it would generally be a waste of judicial resources to rehear the case en banc, because the en

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54. This pattern did not appear in 1997 and 1998. Explanations for this, such as changes in the composition of the court, will be the subject of future research.

banc result would be the same as the panel decision.<sup>55</sup> This most likely explains the difference in the rate with which liberal and conservative panel decisions were selected for en banc review in the Fourth and Fifth Circuits. This use of en banc rehearings, although ideologically motivated, is not improper, as long as the cases selected for review are exceptionally important or resolve an intra-circuit conflict.

Tables 3 and 4 do raise the possibility that the en banc process is being abused by ideological majorities to reverse panel decisions that are not worthy of en banc review. If the liberal panel decisions slated for review do not raise issues of exceptional importance or intra-circuit conflict, then it is reasonable to conclude that they were selected for rehearing simply because the en banc majority disagreed with their ideological tenor. As demonstrated in Section II, this use of the en banc process is not contemplated by rule 35.

A brief review of the liberal panel decisions in Tables 3 and 4 suggests that the Fifth Circuit's use of en banc rehearings, while ideologically motivated, was nonetheless proper because the cases chosen for review involved questions that shaped the law of the circuit. For example, the panel decision in *United States v. Blount*<sup>56</sup> involved routine issues related to the law of search and seizure.<sup>57</sup> The court decided to rehear the case en banc "to address the application of the Supreme Court's decision in *Illinois v. Gates*,"<sup>58</sup> and "to explain that the 'totality of the circumstances' standard announced in *Gates* does not impose a requirement of corroboration in all cases."<sup>59</sup> Thus, even though the en banc court reversed a liberal panel decision, it did so in a manner that developed the law of the circuit.

Similarly, in *Grabowski v. Jackson County Public Defenders*,<sup>60</sup> the panel majority held that a prisoner did not have to show "deliberate indifference" to state a claim under 42

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55. Of course, an en banc court may agree with the outcome of a panel decision while at the same time expanding or contracting the scope of the panel's holding.

56. 98 F.3d 1489 (5th Cir. 1996).

57. *Id.* at 1495.

58. 123 F.3d 831, 832 (5th Cir. 1997).

59. *Id.* at 835.

60. 47 F.3d 1386 (5th Cir. 1995).

U.S.C. § 1983.<sup>61</sup> Instead, the panel majority ruled that the proper test was whether the official action was “reasonably related to legitimate institutional objectives, or whether it was arbitrary and purposeless.”<sup>62</sup> On rehearing, the en banc court held that deliberate indifference was required.<sup>63</sup> Because the choice of the proper legal standard is clearly a question of exceptional importance, the use of an en banc rehearing in *Grabowski* was proper.<sup>64</sup> Thus, even if the rehearing of *Grabowski* moved the law of the circuit in a conservative direction, the rehearing was not an abuse of the en banc process.

The Fourth Circuit’s use of en banc rehearings is similar. In most cases, the liberal panel decisions that were reheard qualified as “exceptionally important,” and thus merited en banc review.<sup>65</sup> However, there are indications that the Fourth Circuit used en banc rehearings in a more aggressive manner, and reheard cases that were clearly not exceptionally important. It may be useful to review two of these cases in more detail.

In *Taft v. Vines*,<sup>66</sup> the plaintiffs were an African-American woman and four minor children who were stopped by police while driving home from a basketball game.<sup>67</sup> The police, who

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61. *Id.* at 1398.

62. *Id.*

63. *Grabowski v. Jackson Co. Public Defenders Office*, 79 F.3d 478, 479 (5th Cir. 1996).

64. In general, the liberal panel decisions that were reheard in the Fifth Circuit seemed to address questions of exceptional importance. *See, e.g.*, *United States v. Kirk*, 70 F.3d 791, 797 (5th Cir. 1995) (finding statute constitutional under the Commerce Clause); *United States v. Crouch*, 51 F.3d 480, 483 (5th Cir. 1995) (addressing standard used to determine whether delay in criminal trial serves as basis for dismissing indictment); *United States v. McGuire*, 79 F.3d 1396, 1400 (5th Cir. 1996) (addressing application of recent Supreme Court decision to determine whether element of materiality had been presented to jury).

65. *See, e.g.*, *Egbuna v. Time-Life Libraries, Inc.*, 95 F.3d 353, 354 (4th Cir. 1996) (addressing whether aliens can state a claim under Title VII for employment discrimination); *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1474 (4th Cir. 1996) (addressing whether school teacher’s direction of school theater group was protectable expression under 1st Amendment); *Riley v. Dorton*, 93 F.3d 113, 117 (4th Cir. 1996) (addressing whether “de minimis” nature of prisoner’s injury precludes civil rights claim); *Robinson v. Shell Oil Co.*, No. 93-1562, 1995 WL 25831 (4th Cir. Jan. 18, 1995) (addressing whether Title VII’s protection of “employees” also extended to former employees).

66. 70 F.3d 304, 308 (4th Cir. 1995).

67. *Id.* at 308.

were searching for an armed murder suspect, ordered each of the plaintiffs out of the car and frisked them.<sup>68</sup> The plaintiffs alleged that the police touched them improperly during the search, and that this constituted sexual abuse.<sup>69</sup> The plaintiffs sued the police and other government officials for civil rights violations.<sup>70</sup>

The district court granted summary judgment for the defendants.<sup>71</sup> The panel reversed in part, finding that the amount of force used by the police officers may have been unreasonable.<sup>72</sup> A dissenting panel opinion evaluated the facts of the case and concluded that the amount of force used by police officers was not excessive.<sup>73</sup> Significantly, the dissent did not argue that the majority's decision would have far-reaching implications. In fact, the dissent noted that "[a]pplication of the qualified immunity defense to a claim of excessive force 'requires careful attention to the facts and circumstances of each particular case.'"<sup>74</sup> Thus, the dissent recognized that the case required the application of settled law to the facts of the case. Nonetheless, the liberal panel decision was reversed en banc, with the en banc court simply adopting the dissenting panel opinion as its own in a per curiam decision.<sup>75</sup>

*United States v. Torres*<sup>76</sup> provides another example of the Fourth Circuit rehearing a case en banc even though the case involved only the application of settled law to facts. In *Torres*, the issue was whether police had reasonable suspicion to search the defendant's duffel bags for drugs. The panel found that reasonable suspicion did not exist. The en banc court, in another per curiam opinion, merely affirmed the district court's finding that reasonable suspicion existed.

*Taft* and *Torres* indicate that, in certain cases, en banc majorities in the Fourth Circuit have taken a more aggressive

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68. *Id.* at 309.

69. *Id.*

70. *Id.* at 306.

71. *Id.* at 310.

72. *Id.* at 315.

73. *Id.* at 321.

74. *Id.* at 319 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

75. *Taft v. Vines*, 83 F.3d 681 (4th Cir. 1996).

76. 65 F.3d 1241 (4th Cir. 1995).

approach to the use of rehearings.<sup>77</sup> Overall, though, a review of the liberal panel decisions that were reversed suggests that the majority of them could be classified as exceptionally important, and thus deserving of en banc review.

In summary, the data in Tables 3 and 4 suggest that ideology can play a significant role in agenda setting on a court of appeals by influencing the types of cases that are reheard en banc. However, a review of the liberal panel decisions that were reversed also suggests that the large majority of those decisions qualified as exceptionally important. Thus, although en banc rehearings may have been used ideologically to shape the law of the circuit, this use of the process was not inconsistent with the legal authority for rehearings.

#### IV. EFFECTS OF THE IDEOLOGICAL USE OF EN BANC REHEARINGS

En banc decisions constitute only a small percentage of the decisions issued by the courts of appeals.<sup>78</sup> Thus, even if the methodology developed in the previous section identifies a pattern of ideological en banc decisionmaking, one may argue that such a pattern is of little consequence. For example, even if a conservative majority reverses 10 of 10 liberal panel decisions that the court rehears in a given year, the en banc rehearing is a relatively ineffectual enforcer of ideological homogeneity if 100 liberal panel decisions do *not* get reversed. The question, then, is whether the liberal panel victories that are reversed by en banc rehearings constitute a significant percentage of liberal panel victories.

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77. See *Spicer v. Virginia Dep't of Corrections*, 66 F.3d 705 (4th Cir. 1995). In *Spicer*, the issue before the court was the fact-sensitive determination of whether an employer had acted immediately and effectively to halt sexually harassing conduct by employees. The majority argued that en banc review of the panel decision was proper because a finding of liability under the facts of the case "would have effected a significant change to Title VII jurisprudence." *Id.* at 711. The dissent argued that en banc review was improper, given the clarity of the guiding principles of law, and that "[t]he light we shed here is not worth the thirteen-judge candle." *Id.* at 714; see also *Cooper v. Taylor*, 70 F.3d 1454, 1456 (4th Cir. 1995) (addressing whether admission of taped confession was harmless error).

78. See Christopher P. Banks, *The Politics of En Banc Review in the Mini-Supreme Court*, 13 J.L. & POL. 377, 394 (1997) ("[B]etween 1970 and 1995 en banc sittings represented, on average, less than one-half of one percent of the circuit court's docket.").



This section concludes that the use of en banc rehearings in the Fourth Circuit did have a significant effect on a liberals' chances of winning. Subsection B analyzes a sample of cases in selected areas of law, and finds that rehearings reduced the number of "true" liberal victories from 14 to 8. This suggests that en banc rehearings can be an effective enforcer of the majority's ideological preferences.

The sample of cases analyzed in subsection B is not limited to cases with dissents, because the goal of the analysis is to determine whether en banc rehearings can affect the overall ideological character of a court's output. However, the analysis of unanimous panel decisions presents certain problems. As noted above, judges generally adhere to precedent. The use of cases with dissents in Section II was intended to separate the effects of stare decisis from ideology. Because subsection B includes unanimous panel decisions, some other method must be devised to separate the effects of stare decisis from ideology.

The method developed in subsection B to accomplish this goal considers the composition of the panel and the votes of each judge to identify ideological voting. For example, if three conservative judges reached a liberal result, it seems reasonable to conclude that the decision was controlled by stare decisis, not ideology. On the other hand, if three liberal judges reached a liberal result, it is at least possible that ideology influenced the outcome of the case. Of course, this methodology requires that each judge be classified as liberal or conservative. That task is the topic of subsection A.

#### *A. Voting Patterns of Individual Judges*

This subsection tallies the votes of judges in each of the panel decisions analyzed in Section II. The cases from Section II were used because cases with a dissent were thought to be more likely to involve ideological voting.

Table 5 displays the results for judges in the Fourth Circuit. The data indicate that most of the judges participating in cases with dissents routinely favored either liberal or conservative interests.

TABLE 5

## LIBERAL AND CONSERVATIVE VOTES IN FOURTH CIRCUIT PANEL DECISIONS WITH A DISSENT, 1995-96

	<i>1995 Liberal</i>	<i>1995 Conservative</i>	<i>1996 Liberal</i>	<i>1996 Conservative</i>	<i>Total Liberal</i>	<i>Total Conservative</i>	<i>Difference</i>	<i>Percent Liberal</i>	<i>Appointing President</i>
Hall	17	2	17	4	34	6	-28	85%	Ford (R)
Murnaghan	9	1	9	2	18	3	-15	86%	Carter (D)
Michael	6	2	11	2	17	4	-13	81%	Clinton (D)
Butzner	6	1	7	1	13	2	-11	87%	Johnson (D)
Ervin	5	0	5	0	10	0	-10	100%	Carter (D)
Motz	9	3	3	1	12	4	-8	75%	Clinton (D)
Phillips	5	1	1	3	6	4	-2	60%	Carter (D)
Wilkins	1	4	0	1	1	5	4	17%	Reagan (R)
Wilkinson	1	5	4	8	5	13	8	28%	Reagan (R)
Widener	4	8	4	8	8	16	8	33%	Nixon (R)
Russell	2	6	0	5	2	11	9	15%	Nixon (R)
Williams	1	10	2	8	3	18	15	14%	Bush (R)
Hamilton	3	13	3	8	6	21	15	22%	Bush (R)
Luttig	0	5	0	15	0	20	20	0%	Bush (R)
Neimeyer	1	14	1	13	2	27	25	7%	Bush (R)

Table 6 presents the findings for the Fifth Circuit. Unfortunately, the data are insufficient to classify many of its judges as liberal or conservative. Table 6 indicates that five judges generally voted to favor liberal interests in the cases under review while six judges tended to favor conservative interests. The other 10 members of the court cannot easily be labeled as liberal or conservative.

As noted above, the Fifth Circuit generally did not include unpublished opinions on Westlaw, so there were fewer cases available for analysis.<sup>79</sup> Moreover, judges in the Fifth Circuit appear to dissent less frequently than judges in the Fourth Circuit.<sup>80</sup> To overcome this problem, votes from 1997 were added to the analysis.<sup>81</sup> However, the data are still generally inadequate to identify the voting patterns (if any) of individual judges in the Fifth Circuit.

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79. *See supra* note 51.

80. To determine the frequency with which judges dissented, a Westlaw search was used to identify the total number of reported panel decisions in which a judge participated, along with the number of dissents issued by that judge. The results indicate that from 1995 to 1997, 105 of 2,359 (4.4%) reported panel decisions in the Fourth Circuit included a dissent. By contrast, only 78 of 5,208 (1.5%) reported panel decisions in the Fifth Circuit contained a dissent.

81. Because the Fifth Circuit is not being compared with the Fourth Circuit, the difference in the time frame for the two was not thought to create a problem.

TABLE 6

## LIBERAL AND CONSERVATIVE VOTES IN FIFTH CIRCUIT PANEL DECISIONS WITH A DISSENT, 1995-97

	1995 <i>Liberal</i>	1995 Conservative	1996 <i>Liberal</i>	1996 Conservative	1997 <i>Liberal</i>	1997 Conservative	Total <i>Liberal</i>	Total Conservative	Difference	Percent <i>Liberal</i>	Appointing President
Politz	7	0	5	0	4	0	16	0	-16	100%	Carter (D)
Dennis	0	0	7	0	7	0	14	0	-14	100%	Clinton (D)
Benavides	3	0	1	0	5	1	9	1	-8	90%	Clinton (D)
Garza, R.	2	0	2	0	3	0	7	0	-7	100%	Carter (D)
Stewart	2	0	0	1	4	0	6	1	-5	86%	Clinton (D)
DeMoss	2	3	6	1	2	2	10	6	-4	63%	Bush (R)
Wiener	3	0	3	4	0	0	6	4	-2	60%	Bush (R)
Johnson	0	0	0	0	1	0	1	0	-1	100%	Carter (D)
Wisdom	0	0	1	0	0	1	1	1	0	50%	Eisenhower (R)
Reavley	3	1	0	2	1	1	4	4	0	50%	Carter (D)
Parker	1	1	1	2	2	1	4	4	0	50%	Clinton (D)
King	0	0	0	0	1	2	1	2	1	33%	Carter (D)
Higginbotham	0	0	0	1	0	1	0	2	2	0%	Reagan (R)
Duhé	0	1	0	1	1	2	1	4	3	20%	Reagan (R)

	1995 <i>Liberal</i>	1995 Conservative	1996 <i>Liberal</i>	1996 Conservative	1997 <i>Liberal</i>	1997 Conservative	Total <i>Liberal</i>	Total Conservative	Difference	Percent <i>Liberal</i>	Appointing President
Jolly	1	3	3	2	1	4	5	9	4	36%	Reagan (R)
Davis	0	2	0	3	1	2	1	7	6	13%	Reagan (R)
Garwood	1	2	2	5	1	5	4	12	8	25%	Reagan (R)
Garza, E.	1	3	2	5	1	6	4	14	10	22%	Bush (R)
Smith	1	5	1	4	0	3	2	12	10	14%	Reagan (R)
Jones	0	4	0	2	0	5	0	11	11	0%	Reagan (R)
Barksdale	0	4	0	6	0	6	0	16	16	0%	Bush (R)

This subsection indicates that the voting patterns of individual judges on the Fourth Circuit are relatively clear. Thus, this information can be used in subsection B to assist in determining whether selected panel decisions were influenced by ideology or stare decisis. However, because there are an insufficient number of dissenting panel opinions in the Fifth Circuit, it will not be included in subsection B.

### *B. En Banc Reversals of Liberal Victories.*

In the next step of the analysis, a sample of 99 Fourth Circuit cases addressing civil rights, employment discrimination, and habeas petitions was gathered.<sup>82</sup> These areas of law were chosen partly because of their relatively clear ideological dimensions, and partly because of the ease with which a sample of cases could be obtained from Westlaw.<sup>83</sup> Decisions favoring the civil rights plaintiff, employee, or habeas petitioner were classified as liberal, while decisions favoring the defendant in civil rights cases (usually a governmental entity), employers, or the state were classified as conservative.

Table 7 reveals the extent to which conservative decisions predominate in the Fourth Circuit. Approximately 75 percent of panel decisions could be considered conservative. More important for purposes of this article, however, is the fact that almost *one-third* of liberal victories were later reversed by en

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82. The Westlaw searches originally yielded 108 cases from the Fourth Circuit. However, 9 cases with mixed results (part liberal, part conservative) were excluded from the analysis. None of the cases with mixed results were reheard en banc.

83. The searches used were:

civil rights—da(1995, 1996) & sy("civil rights" 1983)

employment discrimination—da(1995, 1996) & sy("title vii" ADA ADEA) % sy("civil rights" 1983)

habeas—da(1995, 1996) & sy(habeas) % sy("title vii" ADA ADEA "civil rights" 1983)

banc rehearings. Instead of winning 25 cases in these areas of law during 1995-96, liberals only won 17 such cases.

TABLE 7

TOTAL PANEL DECISIONS AND EN BANC TREATMENT  
(EMPLOYMENT DISCRIMINATION, HABEAS, AND CIVIL RIGHTS)  
FOURTH CIRCUIT, 1995-1996

Panel result <sup>84</sup>	Number of Panel Decision	Number Reheard En Banc	Number Reversed
Conservative, unanimous	63	0	0
Conservative, with dissent	11	1	0
<b>Total conservative</b>	<b>74</b>	<b>1</b>	<b>0</b>
Liberal, unanimous	14	1	1
Liberal, with dissent	11	7	7
<b>Total liberal</b>	<b>25</b>	<b>8</b>	<b>8</b>
<b>Total</b>	<b>99</b>	<b>9</b>	<b>9</b>

As noted above, judges do not ignore the law and simply vote their ideological preferences.<sup>85</sup> In many cases, the law only allows one outcome. Thus, many of the conservative panel "victories" in Table 7 were reached with the approval of one, two, or even three of the Fourth Circuit's more liberal members. Of course, this phenomenon would also apply to liberal victories, with a certain number of them obtained with the approval of one or more conservatives. To the extent that this is the case, the liberal victories in Table 7 become that much less impressive. If the only liberal panels that avoided en banc reversal were those that included one or more conservatives on

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84. This table excludes 9 "mixed" cases, in which one aspect of the holding was conservative and another liberal.

85. See *supra* Table 1 for data showing that combinations of the most liberal judges on the Fourth Circuit routinely voted to affirm conservative district court rulings.

the panel majority, it could be argued that the panel was not ideological, and was instead following a relatively clear rule of law. On the other hand, if a panel composed of three liberals avoided reversal, it is at least possible that the decision was ideological. Although three liberals reaching a liberal result could still be explained by a rule of law that allowed only one outcome, in such cases there is at least a stronger possibility of ideological voting.

Table 8 identifies the composition of the 14 panels from the Fourth Circuit that unanimously reached a liberal result in 1995-96. Based on the data in Table 5, conservative members of the court have been italicized and liberal members bolded. Judges sitting by designation have been treated as neutral (neither italics nor bold), as have Judges Phillips and Wilkins.<sup>86</sup> A liberal result in the unanimous cases listed in Table 8 was potentially a “true” liberal win if there were no conservative members on the panel. If the unanimous panel did include a conservative, the assumption is that the law demanded a liberal outcome regardless of the ideologies of the judges, and the result is not a “true” liberal win. The data show that only 7 of the 14 cases qualify as liberal wins as defined in this subsection.

TABLE 8

## FOURTH CIRCUIT, 1995-1996

Unanimous Liberal Panels	Potential “true” liberal win?	En Banc Result
<i>Russell</i> <b>Motz</b> Lay	No	
<i>Luttig</i> <i>Williams</i> Chasanow	No	
<b>Ervin</b> Wilkins Michael (Dist. J.)	Yes	
<b>Ervin</b> Wilkins <b>Michael</b>	Yes	
<b>Hall</b> Murnaghan <b>Butzner</b>	Yes	
<b>Ervin</b> <b>Michael</b> Messitte	Yes	
<b>Ervin</b> Wilkins <i>Williams</i>	No	
<i>Hamilton</i> <i>Williams</i> <b>Motz</b>	No	

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86. The data from Table 5 on Judge Wilkins suggests that he tended to vote conservative in panel decisions with a dissent. However, given the small number of votes available for him and my desire to err on the side of caution, I treated him as neutral.



Unanimous Liberal Panels	Potential “true” liberal win?	En Banc Result
Phillips <u>Ervin Murnaghan</u>	Yes	Conservative
Butzner <u>Motz Hall</u>	Yes	
<u>Russell</u> Chapman,, Beaty	No	
<u>Murnaghan</u> <u>Hamilton</u> Phillips	No	
<u>Hall</u> Michael Chapman	Yes	

Table 9 includes the same data for Fourth Circuit panels that reached a liberal result over the dissenting vote of one member. To be counted as a “true” liberal win when a dissent is present, the dissent must be conservative and the majority composed of either two liberals or a liberal and a neutral. The dissenting member has been underlined.

TABLE 9

## FOURTH CIRCUIT, 1995-1996

Liberal Panels with Dissent	Potential “true” liberal win?	En Banc Result
<u>Murnaghan</u> <u>Michael</u> <u>Williams</u>	Yes	Conservative
<u>Ervin</u> <u>Russell</u> Norton	Yes	Conservative
<u>Niemeyer</u> <u>Michael</u> <u>Motz</u>	Yes	
<u>Wilkinson</u> <u>Michael</u> Norton	Yes	Conservative
<u>Wilkinson</u> <u>Hall</u> <u>Butzner</u>	Yes	
<u>Murnaghan</u> <u>Motz</u> Young	No	Conservative
<u>Williams</u> <u>Michael</u> <u>Motz</u>	No	
<u>Hall</u> <u>Niemeyer</u> <u>Hamilton</u>	No	
<u>Murnaghan</u> <u>Motz</u> <u>Niemeyer</u>	Yes	Conservative
<u>Murnaghan</u> Lay <u>Hamilton</u>	Yes	Conservative
<u>Niemeyer</u> <u>Hamilton</u> <u>Motz</u>	No	Conservative

Table 9 shows that 7 of 11 liberal panel results with a dissent meet the criteria for a “true” liberal decision. The four cases that do not qualify either have a liberal member dissenting from a liberal result and/or a conservative member joining the majority in reaching a liberal decision. Of the 7 “true” liberal

cases with a dissent, 5 were reversed by the en banc court. Of the 4 other liberal decisions with a dissent, 2 were reversed.<sup>87</sup>

Taken together, Tables 8 and 9 show that 14 of the 25 liberal decisions in the sample of cases qualify as “true” liberal decisions. The other 11 cases may be liberal in that they favor the civil rights plaintiff, the employee, or the habeas petitioner, but the composition of the panels suggests that these 11 cases were less likely to have been decided on ideological grounds. Of the 14 “true” liberal decisions, 6 were reversed by the en banc court. Thus, the en banc process was used to reduce the number of liberal panel victories in the sample by almost *one-half*, from 14 to 8.

## V. CONCLUSION

This article indicates that ideological majorities on a court of appeals can and do use en banc rehearings to set the court’s agenda and shape the law of the circuit. The findings here do not suggest that judges ignore precedent and vote according to their ideological preferences, because the evidence of ideological voting occurred in a narrow subset of cases where, presumably, precedent was either vague or not on point. However, this research does suggest that there are important outlets for the expression of judges’ ideological preferences, and that judges will make use of these opportunities. As distasteful as it may be for some to acknowledge that ideology can influence judicial decisionmaking, the evidence presented here suggests that such influence cannot be ignored.

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87. In a perfectly ideological world, all of the “true” liberal decisions would have been reversed by the en banc court. That they were not is further evidence of the fact that judges do not vote solely according to ideology.

